

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MIGUEL A.,

Claimant,

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

OAH No. L2006050420

DECISION

Gary Brozio, Administrative Law Judge, Office of Administrative Hearings, heard this matter in Santa Ana, California, on October 17, 2006.

Mary Kavli, Program Manager, Fair Hearings & Mediations, represented the Regional Center of Orange County (RCOC).

Miguel A. (claimant) was not present at the fair hearing. He was represented by his mother, Maria R., who was assisted by her friend, Veronica Gomez, and Certified Spanish Interpreter Claudia Calle, No. 107733.

The matter was submitted on October 17, 2006.

ISSUES

Does Miguel have a developmental disability that qualifies him for regional center services under the Lanterman Act?

More specifically, does Miguel have autism, or a condition closely related to mental retardation, or a condition requiring treatment similar to mental retardation?

If so, does Miguel's condition constitute a substantial disability that is it likely to continue indefinitely?

FACTUAL FINDINGS

Background

1. Miguel is eight years old and lives with his mother and older brother in Garden Grove, California. He applied for services at RCOC in 2005.

2. In June 2005, RCOC conducted a Social Assessment, and in September 2005, Dr. Kyle Pontius¹ prepared a Psychologist's Evaluation of Eligibility for Services. Dr. Pontius reviewed relevant documents, interviewed Miguel's mother, and observed Miguel at RCOC. His report concluded that Miguel did not have a developmental disability. On September 28, 2005, an interdisciplinary eligibility team determined that Miguel did not have a developmental disability.

3. Miguel's mother contested that determination, and RCOC agreed to reassess Miguel's condition. For the reassessment, Dr. Pontius and Dr. Peter Himber² interviewed Miguel's teacher and observed Miguel at school and at home. Afterward, Dr. Himber prepared a Physician's Report which concluded that Miguel did not have a developmental disability. On April 5, 2006, an eligibility team again determined that Miguel did not have a developmental disability.

4. Miguel's mother requested a fair hearing.

Autism

5. The Lanterman Act lists autism as a developmental disability. (Welf. & Inst. Code, § 4512, subd. (a).) The criteria for a diagnosis of autism are contained in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). To be diagnosed as autistic, Section 299.00 of the DSM-IV-TR requires that the person have:

“A. A total of six (or more) items from [categories] (1), (2), and (3), with at least two from [category] (1), and one each from [categories] (2) and (3):

(1) Qualitative impairment in social interaction, as manifested by at least two of the following:

(a) Marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction;

¹ Dr. Pontius is a psychologist with over a decade of experience in autism. He performs over 100 eligibility determinations per month, most of which involve autism.

² Dr. Himber is a pediatric neurologist with extensive training and experience in autism. He has examined over 2,000 people with autism.

(b) failure to develop peer relationships appropriate to developmental level;

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest);

(d) lack of social or emotional reciprocity.

(2) Qualitative impairments in communication as manifested by at least one of the following:

(a) Delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);

(b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others;

(c) stereotyped and repetitive use of language or idiosyncratic language;

(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

(3) Restricted repetitive and stereotyped patterns of behavior, interests and activities, as manifested by at least two of the following:

(a) Encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;

(b) apparently inflexible adherence to specific, nonfunctional routines or rituals;

(c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);

(d) persistent preoccupation with parts of objects.

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction; (2) language as used in social communication; (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder.”

6. Dr. Pontius and Dr. Himber testified that Miguel failed to meet the DSM-IV-TR's criteria for a diagnosis of autism. Miguel met none of the criteria from category A(1). Miguel made good eye contact. At school, he was well liked, cooperative, friendly, and observant. He responded to greetings and spontaneously shared experiences with other people. He played, initiated contact with peers, asked adults and peers simple questions, and responded to questions asked of him. He showed emotional reciprocity and was not indifferent.

7. Miguel met only one of the criteria from category A(2). He had a language delay, but that deficit was in the nature of an articulation disorder. He had an inability to speak clearly. But he displayed no echolalia or scripted speech; he talked on the playground and engaged in imaginative play; and he communicated his thoughts and had conversations.

8. Miguel met none of the criteria from category A(3). Miguel was very active. He did not engage in self stimulating behaviors, hand flapping, or rocking. He did not have immutable routines. He was not preoccupied with parts of objects.

9. Miguel's mother testified that Miguel did not begin showing symptoms she thought were unusual until Miguel entered preschool at age four, which suggested that Miguel did not meet the requirements for category B.

10. In addition, Miguel twice took the Childhood Autism Rating Scale, commonly referred to as the CARS test. The minimum score on the test is 15, and a score of 30 is necessary to be considered mildly autistic. Miguel's first score was 26, and his second 18.5. Neither score indicated autism.

11. Accordingly, Miguel cannot be diagnosed with autism under the DSM-IV-TR criteria. To be sure, Miguel has engaged in inappropriate, wild, and oppositional behavior. He was fidgety and hyperactive, but these traits more suggested a possible diagnosis of Attention-Deficit /Hyperactivity Disorder than autism.

Fifth Category

12. The Lanterman Act provides assistance to individuals with a condition "closely related to mental retardation" or who require "treatment similar to that required for individuals with mental retardation." (Welf. & Inst. Code, § 4512, subd. (a).) This is commonly called the "fifth category." "The fifth category condition must be very similar to mental retardation, with many of the same, or close to the same, factors required in classifying a person as mentally retarded." (*Mason v. Office of Administrative Hearings* (2001) 89 CalApp.4th 1119, 1129.)

13. In 2002, the Association of Regional Center Agencies (ARCA) published standards for the purpose of making eligibility determinations under the fifth category. Although the ARCA standards have not been adopted by regulation, they provide a useful guideline.

14. As both experts explained, Miguel does not function similarly to a mentally retarded person because his general intelligence is too high. In January 2005, Miguel took the Comprehensive Test of Nonverbal Intelligence (CTONI), a performance test used for children whose first language is not English. Miguel's I.Q. score was 91, which is in the average range. This test ruled out a diagnosis of mental retardation and placed Miguel well outside the range for fifth category eligibility.

15. As Dr. Pontius explained, Miguel does not require treatment similar to that required for mentally retarded people. He has intellectual capacities well beyond that of mentally retarded people. He does not need the kinds of services that are directed to people with "significantly subaverage general intellectual functioning." (DSM-IV-TR at 41.) Such treatment could be harmful to Miguel because they would limit his possibilities and prevent him from reaching his potential.

Substantial Disability

16. Under the Lanterman Act, a developmental disability must constitute a "substantial disability," requiring proof of at least three "significant functional limitations" in the areas of self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. California Code of Regulations, title 17, section 54001, and the ARCA requirements repeat these requirements under the fifth category. The ARCA guidelines indicate that for children six to eighteen, the last category (economic self-sufficiency) is not applicable.

17. Dr. Pontius ultimately determined that Miguel was not substantially disabled in any area. Although he was slow in acquiring language, Miguel had made great strides and was functioning in the low average range for receptive language, and in the average range for expressive language. His CTONI score indicated average intelligence, and his score of 91 was well above the mark of 70 necessary to be considered substantially disabled in learning. Although Miguel had mild delays in self care, he was not stuck in any one area, and he demonstrated emerging skills and growth. His mobility was normal. He demonstrated ample self-direction in the school setting. He performed adequately with living skills for a child his age. In short, he had no significant functional limitations.

Duration

18. The Lanterman Act requires a developmental disability to be expected to continue "indefinitely." (Welf. & Inst. Code, § 4512, subd. (a).)

As Dr. Himber explained, Miguel's early years were difficult due to observation of physical abuse and this may have contributed to learning delays and behavioral problems. More recently, however, Miguel made excellent progress in school. He also demonstrated improvement as evidenced by the CARS test decreasing from 26 to 18.5. This evidence strongly suggested that Miguel's condition was not likely to continue indefinitely.

Claimant's Evidence

19. Regarding the criteria for autism, Miguel's mother testified that Miguel flaps his hands and repeats movements over and over. She said he plays an inordinate amount of time with a particular teddy bear, he gets angry and throws himself on the floor when she tries to remove a particular red shirt, he eschews playing outdoors. She said he typically does not play with normal children, but instead he plays with children who are autistic or have special needs.

20. Veronica Gomez testified that Miguel does not act like a "regular" child. She said he is angry and sometimes violent. She said he stays indoors and sometimes watches the same video over and over. Miguel plays with her son, who is autistic.

21. Regarding substantial disability, Miguel's mother testified that Miguel could not brush his teeth, dress, bathe, or take a shower. She had to take him to school, and she had to change his pull-ups at home and at school. Miguel did not understand all things said to him, and he often forgot what he was told. He spoke very little and was difficult to understand, but he could point to things he wanted. She said Miguel was a slow learner and that he had not learned a thing in school over the past year. Miguel could not follow directions, clear his plate from the table, or purchase things in the store. He had no difficulties with mobility.

22. A good deal of the mother's testimony contradicted the RCOC's experts' observations, Miguel's teacher's observations, and statements Miguel's mother made during the social assessment. More importantly, the observations were not coupled with any expert testimony establishing that Miguel had autism or that he has a substantial disability. Although pediatric neurologist Eduardo Gallegos diagnosed Miguel with "autistic spectrum disorder," this opinion was not supported by testimony or a detailed report. Thus, it was impossible to say whether Dr. Gallegos rendered a diagnosis of autism under the criteria contained the DSM-IV-TR, and it was impossible to assess the basis for the opinion. Moreover, Dr. Gallegos rendered no opinion on whether Miguel's condition constituted a substantial disability or whether it was likely to continue indefinitely. In short, Dr. Gallegos's sparse comments in medical reports were totally insufficient to establish that Miguel is entitled to regional center services.

LEGAL CONCLUSIONS

The Lanterman Act

1. The Lanterman Developmental Disabilities Services Act (Act) is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et seq.) The purpose of the Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with *developmental disabilities*, regardless of age or degree of handicap, and at each stage of life." (§ 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388 (emphasis added).)

Developmental Disability

2. Section 4512, subdivision (a) of the Act defines a developmental disability as follows:

“(a) ‘Developmental disability’ means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a *substantial disability* for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.” (Emphasis added.)

3. Section 54000 of Title 17 of the California Code of Regulations further defines the term developmental disability:

“(a) ‘Developmental Disability’ means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psychosocial deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result

of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

Substantial Disability

4. Section 4512, subdivision (l) of the Act defines a substantial disability as follows:

“(l) ‘Substantial disability’ means the existence of *significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:*

- (1) Self-care.
- (2) Receptive and expressive language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.
- (7) Economic self-sufficiency.

Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

5. Section 54001 of Title 17 of the California Code of Regulations further defines the term substantial disability:

“(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

6. Section 54002 of Title 17 of the California Code of Regulations states that “‘Cognitive’ as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.”

Burden of Proof

7. In a proceeding to determine eligibility, the burden of proof is on the Claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

The Evidence Was Not Sufficient to Establish That Miguel is Eligible for Regional Center Services

8. Claimant failed to establish that he qualifies for regional center services under a diagnosis of autism or under the fifth category. Claimant failed to establish that he has a substantial disability in any area or that his condition is likely to continue indefinitely. Claimant is not entitled to regional center services under the Lanterman Act. This conclusion is based on all the Factual Findings and Legal Conclusions.

ORDER

The RCOC's denial of services under the Lanterman Act is upheld.

DATED: _____

GARY BROZIO
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.